BARRED FROM WORK:
The Discriminatory Impacts of Criminal Background Checks in Employment

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In the United States, any arrest or conviction may come with a life sentence. While this sentence may not be served in prison, it is served in exile from the rights and opportunities afforded to other individuals, including the opportunity to be employed. And, due to the racially discriminatory underpinnings of our criminal legal system, those sentenced to a life of collateral consequences are disproportionately Black. Facing barriers to entering the workforce is but one of many collateral consequences of this country’s system of incarceration, all of which work in tandem to rob Black people of fair opportunity and full citizenship. Formerly incarcerated people and their families are forced into a “second-class citizenship” where they face lifelong racial stigmatization and legalized discrimination.1 These second-class citizens face barriers to voting and full participation in our electoral system. They are also often excluded from access to public benefits, housing, and credit, including student loans, and may be barred from adopting a child or running for public office. This second-class citizenship is strikingly evident in the employment space, where people with records are stigmatized, legally excluded from multiple professions due to state and local licensing schemes, and excluded from hiring opportunities by both public and private employers because of overly broad policies banning applicants with criminal records.

BACKGROUND

In 2017, Gerald Smith* interviewed for and was offered a job with Global Tech Company (GTC)** designing websites for the State Board of Education. After extending a job offer to Mr. Smith, GTC ran a routine criminal background check. Mr. Smith had already disclosed two prior convictions during the application process—possession of a controlled substance and trafficking in a controlled substance, both of which stemmed from a single event that took place in 2009—so it was no surprise that his background report included these convictions. What was surprising, however, was that following this background check, GTC informed Mr. Smith that they were rescinding his offer because of those convictions. Mr. Smith was not given any opportunity to dispute this determination or otherwise argue that his convictions would have no bearing on his job performance. Had he been allowed to do so, Mr. Smith would have pointed out that after the convictions at issue, but prior to applying to GTC, he had already spent four years successfully employed directly by the State, performing IT work and project coordination as an Administrative Specialist. Also, following his convictions and prior to applying to GTC, Mr. Smith had earned a Masters of Science in Computer Science Technology and an Associate degree in Applied Science/Computer Programming. However, despite his educational achievements and successful employment history with the State, Mr. Smith was barred from working for that client or anyone else through GTC due to the company’s inflexible criminal background policy.

*Name changed for privacy
**Name changed for privacy
Unfortunately, there is nothing unique about Mr. Smith’s experience looking for work with the burden of a criminal conviction. In fact, according to a 2012 survey, almost 70% of employers in the United States conduct criminal background checks for all applicants, and countless others conduct background checks for certain positions. A more recent 2018 survey found that over 70% of job applicants nationwide reported undergoing a criminal background check. And many employers have adopted policies that rely on these background checks to bar a large swath of those with past criminal records from employment. As a general matter, employers are less likely to hire someone with a criminal record because they treat prior convictions, and even prior arrests without convictions, as a proxy for indicators of poor job performance or because they are worried about potential risk (such as the risk of a negligent hiring lawsuit, bad press, or future criminalized activity). In addition to employer-specific policies, every state in the country has a statutory scheme that bans some individuals who have been convicted of crimes from certain categories of employment, either outright or through denial of licenses. These include jobs in schools or childcare facilities, banking, insurance, health care, and real estate among other industries.

The criminal legal system is characterized by racial discrimination at every stage. A disproportionate number of all persons stopped by police, arrested, convicted, and incarcerated in this country are Black. For example, Black people make up 13% of the U.S. population, but 38% of the incarcerated population and 30% of the people on probation or parole. Notably, these disparities are driven by disparate treatment in the criminal legal system and not by underlying racial differences in criminalized behavior. Given the racial discrimination embedded in the criminal legal system, the use of criminal background checks disproportionately excludes Black people from employment. Through criminal background check policies, racial discrimination in the criminal legal system is compounded and imported into the employment sphere. Thus, interlocking and compounding systemic inequalities prevent Black individuals and their families from accessing the opportunities necessary to fully participate in society and democracy. Furthermore, employer concerns that a criminal record is associated with poor job performance are not supported by evidence.

**CONSEQUENCES OF THE USE OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT**

The cost of unnecessary pre-employment criminal background checks to formerly incarcerated people, their families, and their communities is readily apparent. Without employment, individuals have diminished means by which to support their families, retain housing, promote their own health and the health of their loved ones, or participate in the economic life of their communities. Unemployment also creates dignitary harms: work can be an important source of a person’s sense of self-worth, fulfillment, pride, and belonging. Consequently, some have called employment a fundamental prerequisite for social justice.
Moreover, barring people with convictions from employment comes at a severe cost to society. First, stable employment is proven to reduce recidivism. Thus, it is cruelly ironic that hiring policies implemented due to employers’ apprehension that people with records might commit additional crimes, produce the exact conditions under which individuals are more vulnerable to recidivism. These exclusionary practices can result in decreased public safety and feed the growth of the carceral system, which wreaks havoc on communities. This is especially devastating for communities of color that already experience challenges to public safety and continue to face systematic disadvantage and disinvestment. Moreover, the economic costs of a large unemployed or underemployed workforce are staggering. As a report by the National Employment Law Project (NELP) laid out, “[t]he cost of corrections at each level of government has increased 660% from 1982 to 2006, consuming $68 billion a year, and the reduced output of goods and services of people with felonies and prison records is estimated at between $57 and $65 billion in losses.”

The criminal legal system is but one of multiple interlocking systems that combine to produce a workforce ecosystem that disadvantages Black people. First, one must contend with the history and current reality of racial discrimination in hiring, both implicit and explicit. Additionally, this employment discrimination operates within a structural context that further restricts quality employment opportunities for Black communities. This structural context includes racial residential segregation and systematic disinvestment in Black communities; large scale economic trends, including automation and globalization, that have decreased pathways to the middle class; unequal access to quality education along racial lines; unequal access to generational wealth and professional networks; and cuts to public benefits and worker protections.

Together, these factors reduce Black people’s ability to find a job, earn a living, and build wealth. According to the U.S. Bureau of Labor Statistics, since 1972 (the first year the statistics were collected in this manner), the unemployment rate for Black people has more often than not been twice that of the white unemployment rate. And, even when employed, Black workers make less than their white counterparts. According to recent studies, Black men employed full-time earn 87 cents for every dollar made by a white man, and Black women employed full-time earn only 63 cents for every dollar paid to white men. A recent report of the Thurgood Marshall Institute addressing the racial wealth gap noted, “Black and Latinx workers earned less and had less wealth than white workers . . . This is driven in part by the fact that white workers are more likely to occupy quality jobs providing benefits that build and protect assets than their Black and Latinx colleagues.”

Unsurprisingly, inequality in the workforce has only been exacerbated by the COVID-19 pandemic. Black households were 29% more likely than their white counterparts to have reported a pandemic-related job loss. It is this multilayered system upon which racialized criminalization and the associated challenges of re-entry are layered atop.

**TITLE VII LEGAL FRAMEWORK**

Title VII of the Civil Rights Act of 1964, the landmark federal legislation that makes illegal employment discrimination on the basis of race, color, national origin, sex, or religion, invalidates policies of employers that appear neutral on their face but, in reality, have a disproportionate impact on people of a certain protected class, including people of a certain race.
or gender, and cannot be shown to be sufficiently related to or necessary for the job at issue. This legal theory of discrimination is known as “disparate impact.” For example, Title VII would bar a policy that required all employees to be 5’10” or taller—because that requirement would disproportionately disqualify women—unless the employer could show that the minimum height was necessary to perform the job. As another example, in a 1970 case, the Supreme Court said that an employer’s policy of requiring a high school diploma violated Title VII because in that case, a diploma was not an accurate measure of an employee’s ability to learn or perform a particular job or category of jobs within the company and the policy disproportionately disqualified Black applicants. Unlike claims of intentional discrimination, claims of disparate impact do not require proof that a policy was implemented because of prejudice. Instead, disparate impact claims target policies or practices that have an unjustified discriminatory impact. Thus, to the extent employers rely on criminal background check hiring policies that disproportionately screen out Black applicants but cannot demonstrate that there is a “business necessity” for these exclusionary policies, they run the risk of violating Title VII.

Given the overwhelming racial disparities at every level of the criminal legal system, which we will discuss further, employment practices screening out individuals with a criminal conviction will disproportionately impact Black applicants. Depending on the specific contours of an employer’s criminal background screen, that policy may violate the anti-discrimination principles of Title VII. This is likely to be the case when the employment screen used cannot properly assess the risk of employing a candidate or accurately predict the success that the candidate would have if employed in the specific job for which they are applying. Plaintiffs have thus relied on Title VII to legally challenge the use of criminal background checks for over half a century. The past decade especially has seen several such lawsuits, with varying degrees of success and development of the case law in this area. A number of cases have also settled out of court, resulting in policy changes and the payment of damages to individuals who were harmed by the policies.

Litigation and policy efforts to reform the use of criminal background screens have been supported by existing social science research that documents 1) the racially discriminatory impact of criminal background checks and 2) that many criminal background screens are not valid for the purpose of assessing job performance or “riskiness.” Below, we review the social science research on these two topics.

ARE CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT RACIALLY DISCRIMINATORY?

The vastness of our criminal legal system and its racial disparities are well documented. Most recent estimates suggest that approximately 110 million people in the United States (or about one in three people) have criminal records that could be retrieved by a background check. As previously discussed, Black people make up a vastly disproportionate number of this group as a direct result of structural and interpersonal discrimination at all stages of the criminal legal system. This overrepresentation of Black people in the criminal legal system is not explained by racial differences in participation in criminalized behavior, but rather by structural discrimination at the root of the criminal legal system, as evidenced in the following section.
Racial disparities in the criminal legal system are rooted in structural discrimination

The modern criminal legal system has its roots in the U.S.’s history of racial oppression. The criminal legal system does not simply produce racially disparate outcomes by chance, but rather by design. Historians and social scientists have delineated a clear trajectory from law enforcement strategies during slavery and the Reconstruction Era (e.g., vagrancy laws) to modern criminal legal practices that criminalize Black people for behaviors for which white people are not criminalized. For example, the origins of policing as we know it today can be traced back to slave patrols and night watches, which aimed to control and criminalize the activities of Black and Indigenous people. Modern day examples of such laws and policies include stop-and-frisk policing, disorderly conduct laws, and New York’s Rockefeller drug laws.

Black people are disproportionately targeted and punished by the criminal legal system at every stage through laws and policies that disparately target Black people and through the bias of individual system actors. First, with respect to police contact and stops, there is a large body of evidence documenting how police disproportionately target and surveil Black neighborhoods and individuals. For example, multiple studies of traffic stops in jurisdictions across the country show that Black drivers are stopped and searched at higher rates than white drivers. In fact, an analysis of the Chicago Police Department’s traffic stops in 2013 showed that Black and Hispanic drivers were searched about four times as often as white drivers, but contraband was found on white drivers twice as often as Black and Hispanic drivers. Research has documented similar patterns for pedestrian stops and policing of drug sales.

Racial discrimination is also readily apparent in arrest, charging, and sentencing. A meta-analysis of 27 independent datasets from jurisdictions across the country demonstrated that race had a strong effect on the likelihood of being arrested. Namely, Black people had a higher risk of arrest than white people, and this effect persisted even after controlling for the seriousness of the offense or the occurrence of a new criminal offense during the police encounter. Regarding charging and sentencing, one 2013 study traced federal cases from arrest through sentencing and found that Black men were nearly twice as likely to be charged with an offense carrying a mandatory minimum sentence compared to similarly-situated white men (i.e., controlling for arrest offense, district, age, number of defendants, and county-level demographics and crime rates). The researchers also found notable differences in sentencing by race, with Black defendants receiving more severe sentences than similarly-situated white defendants (i.e., controlling for all variables previously listed plus criminal history and education level). Additionally, a study of more than 48,000 misdemeanor and felony cases in Wisconsin between 2000 and 2006 found that white defendants were 25% more likely than Black defendants to have their initial charge dropped or reduced to a lesser crime, and Black defendants received sentences that were longer than those received by white defendants even after controlling for age, gender, type of crime, and prior criminal history. These studies exist within a much larger evidence base documenting racial disparities in arrest, charging, and sentencing.

It is also critical to note that the cyclical nature of criminal legal involvement means that racial discrimination in the system is compounded for an individual over time. As previously described, the civil disqualifications and economic costs of incarceration, such as exclusion from employment, can create a cycle of unemployment, poverty, and criminalization that is difficult to break. Therefore, racial disparities in initial criminal legal contact can be exacerbated over
time as these barriers destabilize people’s lives, increasing the risk of rearrest, and because criminal history is factored into arrest, charging, and sentencing decisions.

Given the structural racism embedded within the criminal legal system, criminal background checks are discriminatory against Black employment applicants by importing the discrimination from the criminal legal system into the employment arena.

**Criminal background checks amplify existing labor market discrimination against Black people**

In addition to importing discrimination from the criminal legal system to employment, criminal records amplify existing labor market discrimination against Black people in the U.S. Social science research demonstrates that Black applicants with a criminal record suffer a greater penalty in hiring than white applicants with a criminal record. As a result, the use of criminal background checks in hiring is expected to further exacerbate racially discriminatory outcomes in employment.

A body of research led by sociologist Devah Pager documents a strong pattern of discrimination against Black applicants that is magnified for those with a criminal conviction. In fact, in her seminal 2003 experimental test of applications for entry-level jobs, Pager found that a higher percentage of white people with criminal records (17%) were called back for an interview than Black people without criminal records (14%). The findings from this experiment also suggested that the effect of a criminal record on callbacks was stronger for Black applicants than white applicants. Pager conducted a subsequent experiment in 2009 focused on low-wage jobs. It offered similar evidence that the penalty of incarceration on the likelihood of a callback and the likelihood of a job offer was larger for Black applicants with a criminal record than white applicants with a criminal record, and that Black applicants with no criminal record did not fare better than white applicants just released from prison.

Additionally, an analysis of nationally representative data from the 2008 National Former Prisoner Survey confirms this pattern of general employment discrimination for Black applicants that is increased when Black applicants have a criminal record. Researchers at the Prison Policy Initiative found that the unemployment rate disparity between people with and without a criminal record is much higher for Black people, and particularly Black women, than white people. The working-age “prison penalty” increases unemployment rates by 14 percentage points for white men, compared with 28 percentage points for Black men and 37 percentage points for Black women. Given the disparate impact of a criminal record on Black job applicants, criminal background checks serve to amplify existing implicit and explicit racial discrimination in hiring and employment.

**Criminal background checks are often inaccurate and outdated**

FBI background checks are considered the gold standard for criminal background checks, and yet reports estimate that 50% to 80% of FBI records are inaccurate. A 2013 NELP report found that at least one in every two FBI records failed to include information on the final disposition of the case. This lack of up-to-date information on case disposition harms potential applicants because roughly one-third of felony arrests do not result in conviction and many of those that do result in conviction are reduced to misdemeanors. NELP also estimated that 1.8 million workers per year are subjected to FBI background checks with inaccurate or incomplete information. These inaccuracies can disproportionately impact Black applicants because, as previously discussed, Black people are subject to much higher rates of arrests than white people.
and many of those arrests do not lead to convictions. NELP found that Black port workers in the Transportation Security Administration’s background check process were four times more likely than their white counterparts to appeal an inaccurate FBI criminal background check record.

Most employers do not use the FBI database and instead rely on private background check companies to obtain criminal record information on potential applicants. The criminal history data compiled by private background check companies is even less accurate than FBI data because these companies often use faulty and outdated public records, use software that fails to differentiate people with similar names, and create duplicate criminal records by compiling records from overlapping agencies.38

ARE ARGUMENTS LINKING CRIMINAL RECORDS WITH JOB PERFORMANCE AND “RISKINESS” VALID?

As previously described, two of the key components of the Title VII disparate impact legal framework are whether the policy: 1) has a disproportionate impact on a protected group and 2) is not related to the job at issue or consistent with “business necessity.” Thus, a criminal background check policy that has a discriminatory impact may nonetheless be valid under Title VII if the employer can demonstrate that it is related to the job in question and serves a business necessity. Employers have argued that criminal records serve as a proxy for indicators of poor job performance, such as honesty and reliability, and that people with a criminal record may be more “risky.” Yet research has shown that a criminal record is generally not an accurate indicator of poor job performance or “riskiness.”

Is a criminal record associated with job performance?

Studies focused on the association between criminal records and job performance, while somewhat limited, suggest that people with a criminal record display the same level of job performance as people without a record. In some cases, employees with a criminal record have higher retention rates compared to those without. One of the first systematic assessments of job performance among people with a criminal record was a 2018 study of a U.S. military initiative to recruit and hire people with felony-level criminal records.39 The researchers followed 1.3 million military employees from 2002 to 2009 and found that people with a felony record were no more likely to be discharged for poor job performance than people without a felony record. The researchers also found that employees with a felony record were promoted more quickly and to higher ranks than those without a felony record. For example, employees with a felony record were 32% more likely to be promoted to the rank of sergeant than similarly situated employees with no felony record. And employees with a felony record were only slightly more likely to be discharged early due to a legal infraction under military law (6.6% vs. 5%).40

Another study published in 2018 assessed more than 10,000 hired workers who were reviewed by a hiring consultancy (a company that provides hiring recommendations to corporate clients).41 The researchers found that employees with a criminal record had a longer tenure and were less likely to quit their jobs compared to employees without a criminal record. When assessing the likelihood of being fired or let go, the researchers found differences by job type. For example, in customer service jobs, employees with a criminal record were no more likely to
be let go than employees without a record. By contrast, in sales jobs, employees with a criminal record were more likely to be let go than those without a criminal record. The study showed that rates of misconduct were higher in sales jobs than in customer service jobs overall, regardless of prior criminal history, and the authors surmised that this difference may be attributable to factors related to the sales job environment that increase risk of misconduct for all employees and have a stronger effect on employees with criminal records.

These findings that employees with a criminal record generally perform just as well as other employees, and in some cases perform better, is also consistent with a 2017 report from the American Civil Liberties Union (ACLU) highlighting case studies from specific employers who tracked retention rates of employees with and without a criminal record and found higher retention rates among employees with criminal records.42 One such case study was from Total Wine & More, where annual turnover was 12.2% lower on average for employees with criminal records compared to those without. Similarly, the Human Resources department at the Johns Hopkins Health Resource Center found employees with criminal records had higher retention rates than employees without records. A third case study was from Electronic Recycler International, where adopting a program to recruit employees with criminal records led to a reduction in turnover from 25% to 11%. The costs of turnover, recruitment, and training are high – estimates range from one-half to two times the original employee’s salary – so higher retention rates among people with a criminal record can result in significant cost savings for employers.43

Taken together, this research provides promising evidence that a criminal record has little to no negative association with job performance and, if anything, may be linked with higher retention rates. However, there is some evidence that this relationship may vary by job type. As employers adjust their criminal background check policies to align with best practices, comply with an increasing number of state and local laws that curtail their overuse, and avoid litigation, we should expect to see an increasing number of employers who have experience hiring people with past criminal records. This will allow researchers additional opportunities to assess how employees with criminal records perform relative to other employees.

**Are people with criminal records “riskier”?**

With respect to arguments that people with criminal records are “riskier” in terms of the likelihood of being rearrested or posing a threat to public safety, it is important to first consider how risk is defined in this context. Riskiness is often measured through rates of rearrest/recidivism. However, measurements of people’s levels of risk reflect racial disparities in policing, and the criminal legal system generally. It is well established that incarceration itself can increase the likelihood of future criminalization due to increased surveillance and scrutiny by criminal legal system actors.44 This is expected because the consequences of incarceration – job loss, housing loss, disruption of family and community ties – create a context that makes police encounters more likely.45 In addition, probation and parole terms are marked by strict conditions and heightened surveillance. A person with a criminal record can be rearrested and reincarcerated for a technical probation/parole violation, such as failing to maintain stable employment or missing a curfew – an act that would otherwise not be criminalized. Black people on probation are more likely to have technical violations, and due to higher rates of policing in Black neighborhoods, are more likely to be rearrested compared to white people on probation.46 Therefore, it is first important to acknowledge that the notion of risk in the context of hiring
people with a criminal record is more likely to reflect preexisting discrimination in the criminal legal system and not actual risk to public safety.

Despite the limitations of recidivism as a measurement of risk and its reflection of preexisting discrimination in the criminal legal system, employers sometimes use the risk of rearrest or reoffending, independent of job performance, as a proffered legitimate business concern in responding to claims of discrimination.47 Employers and courts have long relied on the assumption that the existence of a criminal record is predictive of an individual’s likelihood of engaging in criminal behavior in the future. While earlier criminology research focused exclusively on the positive relationship between past and future criminal offending,48 more recent research has more deeply interrogated when and how the existence of a prior criminal conviction is useful in predicting an individual’s risk of reoffending. For example, one group of studies exposes the complexities of relying on prior criminal behavior as a predictor of recidivism, showing stable employment strongly predicts decreased recidivism.49 Other studies show that aging is one of the most powerful predictors of decreased recidivism.50

Moreover, leading criminologists in the field of recidivism have designed studies to determine how much time would need to pass before an employer could reasonably assume that a person with a criminal record posed a sufficiently “low risk” and could be safely hired. Two large cohort studies, one in Philadelphia and one in New York State, demonstrated that the risk of rearrest weakens rapidly over time following an initial arrest.51 The studies found that criminal history becomes irrelevant as a predictor of rearrest between roughly four to eight years after the initial arrest.

These studies and similar ones can help employers and courts answer the baseline question of whether and when those with records resemble those without records, and thus weed out policies with overly long look-back periods into a person’s criminal history as unrelated to business necessity. However, these studies were not designed to answer the more central question of what kind of risk threshold should guide hiring decisions or, put another way, at what point banning individuals with an increased risk of arrest can actually be classified as a business necessity.

In their 2017 article “Redeemed Compared to Whom?”, Samuel E. DeWitt and colleagues critique earlier approaches exploring recidivism and risk for employers.52 They note that past studies assessed risk in an age-specific way, which created “an array of cutoffs that are age-specific—individuals are only ‘low risk’ when they have the same level of risk as someone of the same age who does not have a record.”53 Because risk of offending for all individuals decreases with age, an older applicant with a criminal record may have a lower risk of arrest than a younger applicant without a record. However, the past research that makes age-specific comparisons holds older applicants with a criminal record to the higher standard of demonstrating a lower risk than similarly aged people without a criminal record. Thus, the researchers conclude that a criminal background policy tailored based on the earlier recidivism research would not be a valid way to predict risk because it would overestimate the likelihood of reoffending.

This research points to the fact that job applicants with criminal records may be held to higher standards, in terms of risk of arrest, than applicants who have no criminal record. As a result, criminal background check policies may not actually accomplish the oft-stated goal of
employers: weeding out higher-risk individuals. Instead, criminal background check policies are likely to further punish people, particularly Black people, who are already disproportionately targeted and punished by the criminal legal system. Ultimately, all potential employees pose some risk of criminalized behavior. The use of prior criminal history as a marker for future risk of rearrest should be weighed against the employer costs of excluding a potentially productive and low-risk worker from employment and the societal costs of systematically excluding a large swath of the population from employment.

RECOMMENDED POLICY SOLUTIONS

Despite strong bipartisan support for removing barriers to employment for people with criminal records, there is still a tremendous amount of work to do to ensure that people with records are allowed to work to support themselves and their families and contribute to society. Title VII litigation can be both expensive and slow, and courts’ adjudication of these claims can be unpredictable. Given these litigation challenges, it is imperative that, while shoring up the social science to support further challenges under civil rights law, advocates pursue multiple other avenues to combat the overuse of criminal background checks and the continuing use of discriminatory practices that bar qualified workers from employment.

The work to curb the use of criminal background checks in hiring is not new, and many states and localities have already enacted laws to prevent the overuse of criminal histories. The Ban the Box movement is the most prominent and successful example of this. The Ban the Box campaign was spearheaded by a grassroots organization of formerly incarcerated people and their families, All of Us or None, in San Francisco and Alameda County in 2005. Ban the Box called for removing the question and check box, “Have you been convicted by a court?” from applications for employment, housing, public benefits, insurance, loans, and other services. All of Us or None joined forces with NELP, and successfully built multistakeholder coalitions to support passage of laws that enabled applicants to get past initial hiring stages without having to disclose any criminal record to a potential employer. Now, according to NELP, over 30 states and 150 city/local governments have Ban the Box or other fair chance hiring laws that limit or delay when employers can conduct criminal background checks. Of these, 15 states and 22 cities and counties extend their fair chance hiring laws to private employment. As detailed on the web-based toolbox NELP maintains regarding these laws, the majority of these laws actually do more than simply “Ban the Box” but also adopt other best practices with respect to diminishing the harmful effects of hiring policies that exclude people with criminal records.

Even with Ban the Box in place, employers may unjustly use an individual’s criminal record as the basis for employment exclusion without considering job relatedness and business necessity. Certainly, Ban the Box has increased opportunity for some individuals with criminal records, but for others, the impact of an early question about criminal convictions has been supplanted by disqualifying background checks further along in the hiring process. Thus, many of the Title VII challenges to criminal background check policies seek to dismantle hiring policies that come into effect after an individual has already been given a provisional offer of employment.

Even if it worked as it was designed to, Ban the Box would not in itself be capable of radically changing employers’ use of criminal background checks to exclude people with records from employment. As noted, several state and local fair chance hiring laws include other protections for people with convictions, including, for example, language stating no person shall be
disqualified from employment, solely or in part because of a prior conviction, unless it is a job-related conviction.\textsuperscript{58} Some jurisdictions have also adopted community hiring models that incentivize hiring from local communities, including formerly incarcerated people.\textsuperscript{59}

Additional promising policy solutions to curb the harmful effects of criminal background checks include but are not limited to:

**Automatic record expungement**

Many states have recognized the harm that past criminal records pose on future employment and housing opportunities, and have passed measures to seal or expunge criminal records for certain offenses after a certain period of time has passed. Still, the process required to apply for record sealing or expungement can often be cumbersome and inaccessible for many.\textsuperscript{50} In a 2020 study of an expungement law in Michigan, researchers found that just 6.5% of people eligible for expungement obtained it within five years.\textsuperscript{61} As a result, more states are considering automatic expungement laws, eliminating administrative and cost burdens on the process of record expungement.\textsuperscript{62} The same Michigan study found that people who were able to have their records expunged had similarly low subsequent crime rates compared to the general population and experienced a 22% increase in wages within one year compared to their pre-expungement trajectories, demonstrating the benefits of record expungement when it is accessible.\textsuperscript{63} Additionally, information from sealed records can still show up on certain background checks, so it is important that automatic expungement is complete, permanent, and includes all types of offenses.\textsuperscript{64}

**Fair chance funding to incentivize hiring people with records**

The Work Opportunity Tax Credit (WOTC) is a federal tax credit for employers who hire people who have barriers to employment, including people with a felony record. The WOTC should become a permanent federal policy (currently, it must be reauthorized by congress every six years). Additional measures to strengthen employer participation, such as education and outreach efforts, would be valuable.

**Restricting the availability of background check information available to employers**

Advocates have suggested limiting the background check information that is available to employers.\textsuperscript{65} Currently, the ease of obtaining this information provides an incentive for employers to rely on background check information without much regard for its efficacy or accuracy. Because evidence clearly demonstrates that recidivism risk declines rapidly as time since a conviction passes, background checks should at least be time-limited to a narrowly defined look-back period. More critically, given the documented racial discrimination at every stage of the criminal legal system, we know that prior criminalization is a reflection of this structural bias and should therefore not be considered an informative indicator of an applicant’s potential job performance.

**Mitigating the harms of faulty background check information**

Efforts should be made to mitigate the harms of the often-inaccurate information obtained through criminal background checks. For example, any person subject to a criminal background check should receive a copy of the results so that they can verify its accuracy before employers
make hiring decisions. There should be stronger government regulation of private background check companies, which often rely on faulty public records information. Lastly, federal and state agencies can do more to actively enforce existing laws and mandates meant to ensure accuracy of background checks, such as the Fair Credit Reporting Act.

**Funding for re-entry services**

State and local governments have a responsibility to adequately fund re-entry services that include job readiness programming and paid transitional employment opportunities. Evidence demonstrates that re-entry programs that include paid transitional jobs can increase employment for people with prior criminal convictions and reduce the likelihood of future criminal legal contact.66

Finally, it bears emphasis, that the most effective way to tear down discriminatory barriers to employment for people with criminal records is to decrease the number of people with criminal records. Policies that promote decriminalization, decarceration, and investments in community-based alternatives to policing will ultimately be the most effective in ensuring equity in employment opportunities.

**CONCLUSION**

The use of criminal background checks in employment has prevented many formerly incarcerated people from accessing employment and becoming fully contributing members of their communities. Black people have disproportionately suffered this collateral consequence, given the racial discrimination that undergirds the criminal legal system. Employment promotes community cohesion, reduces public spending on benefits and the criminal legal system, and increases safety and civic participation. Maintaining a class of the permanently unemployable does the opposite. This brief highlights the profound costs of policies that ban people from employment and the lack of evidence of their efficacy in promoting workplace productivity and safety. Litigators, researchers, policymakers, and advocates all have important roles to play in elucidating and combating the harms of such policies.

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REFERENCES


18. See id. at 20.


26. Id.


28. Id.; see also id. at 27–28.


34. Id.


37. Id.


40. Id. Note: military law is more restrictive and has a lesser burden of proof than standard civilian law, and the researchers could not obtain information on the nature of the underlying infraction.

41. Minor et al., supra note 4, at 5–7.


45. Don Stemen, supra note 44, at 2.


47. El v. Se. Pennsylvania Transp. Auth. (SEPTA), 479 F.3d 232, 247 (3d Cir. 2007) (crediting Defendant experts’ testimony that people with records are at an increased risk of committing another crime as sufficient to demonstrate business necessity).


53. Id.


56. Id.

57. Id.

58. Id.


60. Aaron Morrison, Nearly 600,000 New Yorkers Are Eligible to Have Their Records Sealed. Fewer Than 1,800 of Them Have Succeeded, Appeal (8 Oct 2019), https://theappeal.org/nearly-600000-new-yorkers-are-eligible-to-have-their-records-sealed-fewer-than-1800-of-them-have-succeeded/.


63. Prescott & Starr, supra note 61.

64. Aaron Morrison, supra note 60.
